fact that an acquittal of the burglary does not prevent a conviction under another indictment charging the intent to steal instead of the actual taking.[13] It would seem, therefore, that the fact that the two crimes may be joined does not sufficiently establish their unity to render it a violation of the rule against double jeopardy to sentence for each. Moreover, the argument that this is opposed to the humane policy of our penal jurisprudence in that it punishes the defendant for each step of a transaction which is inspired by one criminal intent and which is in reality but a single continuing act, would seem to have little weight. Tenderness for the criminal should not prevent his being punished for each crime he has committed.[14] The true view is that "while the two criminal acts may be regarded and indicted as a combined crime, neither enters into the nature or substance of the other",[15] and therefore the defendant who has been sentenced for both burglary and larceny committed in the course of the same transaction cannot be heard to complain.

RIGHT TO RESCIND STOCK SUBSCRIPTIONS OBTAINED BY FRAUD.—In the English courts, the interpretation of "The Companies Act, 1862"[1] has long settled the rules applicable when the right of a stockholder to rescind a subscription fraudulently procured[2] conflicts with the claims of creditors of the corporation. So long as the corporation remains solvent, the shareholder who has proceeded with diligence may rescind the contract and recover payments made thereunder;[3] but when the company has become insolvent the rights of creditors attach upon the "winding up" and prevent rescission, every shareholder of record being deemed liable as a contributory,[4] even though the fraud could not have been discovered until after insolvency.[5] This is, of course, purely a question of statutory construction, and should have no influence on the abstract problem presented to American courts.[6]

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[13]Vandercomb's Case (1796) 2 Leach 816.

[14]State *v.* Nash (1882) 86 N. C. 650; State *v.* Faulkner (La. 1887) 2 So. 539; Copenhaven *v.* State *supra.*

[15]Gordon *v.* State *supra.*

[1]25-26 Vict. c. 89.

[2]At one time a corporation was not bound by the fraudulent representation of an agent, but it is now settled that a corporation cannot retain the benefits of a subscription obtained through the fraud of an agent without an assumption of the burden. 14 Am. L. Rev. 178 *et seq;* 1 Cook, Corp., §§ 139, 140.

[3]Ry. Co. *v.* Kisch (1867). L. R. 2 Eng. & Ir. App. 99. The shareholder must have his name removed from the register, *In re* Hull and County Bank (1880) L. R. 15 Ch. Div. 507, but if he has commenced an action for this purpose, the subsequent insolvency of the corporation is immaterial. Smith's Case (1867) L. R. 2 Ch. App. 604.

[4]25-26 Vict. c. 89, § 23. "* * * * and every person who has agreed to become a Member of a Company under this Act and whose Name is entered on the Register of Members, shall be deemed to be a Member of the Company." Oakes *v.* Turquand (1867) L. R. 2 Eng. & Ir. App. 325.

[5]Stone *v.* City and County Bank (1877) L. R. 3 C. P. D. 282.

[6]Oakes *v.* Turquand *supra,* at page 353: "In the conclusion at which I have arrived in this case I rely altogether upon the words of the Act. I do not take into consideration the principle which has governed many decisions, as to which of two innocent persons is to suffer." A similar

Since corporate capital, or its equivalent, the sum of unpaid subscriptions, is the basis of dealings between creditors and the corporation, it is but fair to prefer the creditor to the stockholder when their rights conflict upon a division of assets.[7] This is the basis of the so-called creditor's equity, and obviously it cannot arise before insolvency,[8] for earlier the ability of the company to meet its obligations precludes any claim by the creditors against the individual stockholder. Surely mere reliance on the subscription cannot, while the company is solvent, convert the creditor's legal right against the corporation into an equity against the shareholder, and so defeat the latter's right to rescind his subscription;[9] but if the shareholder has not pursued his remedy with diligence,[10] his laches may prevent rescission even as against the corporation.[11]

A view most favorable to the position of the shareholder after the insolvency of the corporation is presented in the case of *People* v. *California Safe Deposit Co.* (Cal. 1912) 126 Pac. 516. Acting with the greatest diligence, the stockholder did not discover the fraud until after insolvency, when he pursued his remedy promptly. The court permitted rescission, although the company had become obligated to creditors in the interval between the subscription and insolvency. The court admits that a specific creditor who had relied upon the complainant's subscription would prevail, but inasmuch as such a creditor did not appear in the case, the receiver was not permitted to enforce the privilege of an unascertained person. Usually, it is true, one who

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construction seems to have been put by the federal courts on the extraordinary liability imposed on National Bank shareholders by R. S. § 5151. Scott *v.* Latimer (1898) 89 Fed. 843; affirmed *sub. nom.* Scott *v.* Deweese (1901) 181 U. S. 202. Several American courts have apparently followed the English cases without recognizing the influence of the statute. Briggs *v.* Cornwell (N. Y. 1881) 9 Daly 436; Martin *v.* South Wales Land Co. (1896) 94 Va. 28.

[7]2 Morawetz, Corp., §§ 839, 894; 8 COLUMBIA LAW REVIEW 303; 10 COLUMBIA LAW REVIEW 479; see Hollins *v.* Brierfield Coal etc. Co. (1893) 150 U. S. 371.

[8]11 COLUMBIA LAW REVIEW 477. It must be noted that the creditor has but an equity, so that if shares are issued as fully paid up and come into the hands of a *bona fide* holder for value, the creditor's right is barred. Brant *v.* Ehlen (1882) 59 Md. 1.

[9]Fear *v.* Bartlett (1895) 81 Md. 435; West End Real Estate Co. *v.* Nash (1902) 51 W. Va. 341. An election to retain the stock bars subsequent rescission, Weisiger *v.* Richmond Ice Co. (1894) 90 Va. 795, but not an action for damages. Potts *v.* Lambrie (N. Y. 1910) 138 App. Div. 144. In this country a formal action to remove the shareholder's name from the corporate register is not essential to a valid rescission. Savage *v.* Bartlett (1894) 78 Md. 561. But if subsequent creditors were involved, the existence of the stockholder's name on the books of the corporation would seem to give rise to an estoppel. Duffield *v.* Barnum etc. Works (1887) 64 Mich. 293; 1 Cook, Corp., § 161.

[10]Laches may consist either in failure to discover the fraud in a reasonable time, Savage *v.* Bartlett *supra,* or in failure to pursue the remedy after knowledge of the facts. See Ashley's Case (1870) L. R. 9 Eq. 263; N. Y. Life Ins. Co. *v.* McMaster (1898) 87 Fed. 63.

[11]Dynes *v.* Shaffer (1862) 19 Ind. 165; Ramsay *v.* Thompson Mfg. Co. (1893) 116 Mo. 313. In Reid *v.* Owensboro Bank (1911) 141 Ky. 444, it was held that an assignee stood in the shoes of the corporation and that the only question was one of laches, on which ground the court denied relief. See also Ky. Inv. Co. *v.* Schaefer (1905) 120 Ky. 227.

asserts an estoppel must show reliance on the representation; but when it is asserted by a class, as creditors, it is generally held that convenience demands a broader view;[12] and express reliance need not be affirmatively shown in each specific instance. When the problem arises after insolvency most American courts have rested upon laches in denying relief,[13] but when the rights of subsequent creditors are concerned, laches would seem to be merged in estoppel, and, instead of being a basis for decision, to be really but matter of aggravation.[14] Since the stockholder has represented that he is responsible for corporate obligations to the extent of his subscription, the question is, whether A, fraudulently induced by B to make a representation, can later defend against C, who has relied on the representation, by setting up B's fraud. Stated in this way, the shareholder's contention cannot be sustained.[15] This reasoning is, of course, wholly inapplicable when the only creditors whose rights are at issue base their claims on obligations incurred before the subscription was made. These existing creditors parted with nothing on the faith of the representation, and cannot assert priority on the ground of estoppel,[16] although laches may make their rights superior to those of a non-diligent shareholder.[17] But the diligence of the stockholder cannot detract from the right of subsequent creditors who have relied on the subscription.[18] The result may further be placed upon the ground that where one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury, must bear the loss.[19]

STATE INSOLVENCY LAWS AND THE NATIONAL BANKRUPTCY ACT.—By the Constitution of the United States it is said that Congress "shall have power to establish uniform laws on the subject of bankruptcies."[1] It has long been well settled that the power of Congress, being per-

[12]Ewart, Estoppel, 141 *et seq.* The courts will protect the rights of creditors even though they are not parties to the particular action. Dunn *v.* State Bank (1894) 59 Minn. 221.

[13]Upton *v.* Englehart (U. S. 1874) 3 Dill. 496; Howard *v.* Turner (1893) 155 Pa. 349.

[14]Park *v.* Kribs (1900) 24 Tex. Civ. App. 650.

[15]Ewart, Estoppel, 94 *et seq;* Burleson *v.* Davis (Tex. 1911) 141 S. W. 559; see Hinkley *v.* Sac Oil Co. (1906) 132 Ia. 396; but see Litchfield Bank *v.* Peck (1860) 29 Conn. 384. A somewhat analogous situation is presented when a pledgee secures a transfer of stock to his own name. Under such circumstances he is liable as a shareholder, Rosevelt *v.* Brown (1854) 11 N. Y. 148, unless the corporate books apprise creditors of his real interest. Pauly *v.* State etc. Trust Co. (1897) 165 U. S. 606.

[16]Beale *v.* Dillon (1896) 5 Kan. App. 27; Savage *v.* Bartlett *supra.*

[17]See Newton *v.* National Bank of Newbegin (1896) 74 Fed. 135. The standard of diligence required where creditors are concerned may well be higher than when the corporation alone is involved. See Duffield *v.* Barnum etc. Works *supra.*

[18]Where a shareholder is under a direct statutory liability to creditors, 12 COLUMBIA LAW REVIEW 636, 742, it is even clearer that the creditor should prevail; since it cannot be claimed that he is merely asserting a corporate right.

[19]See Gress *v.* Knight (1910) 135 Ga. 60.

[1]Art. 1, § 8.